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In the Supreme Court of the United States

October Term, 1983

SHELDON STEIN,
Petitioner,

vs.

ANGELO GAGLIARDO,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether a District Court was precluded by the abstention doctrine of *Younger v. Harris* from considering an action for declaratory judgment and injunctive relief filed pursuant to 42 U.S.C. Section 1983 where state quasi-criminal proceedings are threatened but not actually commenced.

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No.

In the Supreme Court of the United States

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SHELDON STEIN,
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PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on January 25, 1984.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. The opinion is set forth in the Appendix at page A1.

The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, is unreported as of this date. The opinion is set forth in the Appendix at page A2.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254.

CONSTITUTION AND STATUTES INVOLVED

United States Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C. § 1983

Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. As amended Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.

Ohio Code of Professional Responsibility

(Excerpts)

Relevant sections are set forth in the Appendix at A7.

STATEMENT OF FACTS

This is an action for declaratory and injunctive relief brought pursuant to 42 U.S.C. 1983 by Sheldon Stein ("Stein"), petitioner herein. Stein is an attorney and a member of the bar of the State of Ohio. Respondent, Angelo Gagliardo ("Gagliardo"), is an attorney employed by the Ohio Supreme Court to prosecute alleged violations of the Ohio Code of Professional Responsibility by attorneys in Ohio. He has no power to adjudicate or determine constitutional challenges to these regulations.[1]

Stein published an advertisement in the Cleveland, Ohio, Yellow Pages. The format of the advertisement was prepared by the American Bar Association and distributed to lawyers throughout the United States. The advertisement informs people with debt problems of the availability of debt relief programs from which they might benefit, and invites such persons to call for further information. The advertisement is reproduced at page A17 of the Appendix.

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1. This is confirmed in a letter from Gagliardo to Stein, dated June 3, 1983, in which Gagliardo writes: "[T]his office has no authority to declare a rule adopted by the Ohio Supreme Court unconstitutional. The function of this office is limited . . . [to investigate and thereafter] . . . file a complaint with The Board of Commissioners on Grievances and Discipline." (App., p. A30).

From time to time, Stein also mailed copies of his advertisement to people whom he believed might benefit from legal services because of pressing financial problems. A copy of the document mailed is reproduced at page A18 of the Appendix.

On April 25, 1983, Gagliardo wrote to Stein, asserting that the contents of the advertisement, although truthful and nondeceptive, violated a provision of the Ohio Code of Professional Responsibility pertaining to legal advertising, and further asserting that the mailing of the advertisement violated the anti-solicitation provisions of the Ohio Code of Professional Responsibility, which bans all direct mail contact by attorneys. According to Gagliardo, the Supreme Court of Ohio had ". . . not amended any of the rules in the Ohio Code of Professional Responsibility pertaining to advertising" despite this Court's decisions in *Bates v. Arizona*, 433 U.S. 350 (1977) and *In Re R.M.J.*, 455 U.S. 191 (1982). Gagliardo said that he intended to seek enforcement of the Code *as written*, and instructed Stein to cease such activity and to advise ". . . [b]y written statement within ten (10) days . . . of [his] intention to comply with the Code of Professional Responsibility." This letter is reproduced at page A19 of the Appendix.

On May 5, 1983, Stein responded to Gagliardo's letter. In his response, reproduced at page A21 of the Appendix, Stein pointed out that the holdings in *Bates* and *R.M.J.*, as well as various subsequent decisions from lower courts, clearly established that his conduct was protected First Amendment activity, and further noted that these cases rendered various portions of the Ohio disciplinary code unconstitutional and invalid.

Gagliardo responded by letter dated May 16, 1983. He again told Stein that unless he ceased the protected First

Amendment activity, Gagliardo would file disbarment proceedings against him. This letter is reproduced at page A26 of the Appendix.

It was now clear that Gagliardo was aware of the invalidity of portions of The Ohio Disciplinary Code, but that he nevertheless intended to use the threat of disbarment proceedings to coerce Stein into ceasing protected First Amendment activity. On June 1, 1983, Stein again wrote to Gagliardo and asked him to reconsider his position in light of the obvious conflict between the decisions of this Court in *Bates* and *R.M.J.* and Ohio's disciplinary regulations. A copy of this letter is reproduced at page A28 of the Appendix.

Gagliardo remained intractable. In a letter dated June 3, 1983, and found at page A30 of the Appendix, he again told Stein he would begin disbarment proceedings against him within five (5) days unless Stein agreed to cease his protected First Amendment activity.

At this point Stein was faced with a Hobson's choice. Gagliardo was attempting to coerce Stein into foregoing protected First Amendment activity by threatening to begin disbarment proceedings against him. The disciplinary regulations upon which Gagliardo based his threats were obviously invalid and unconstitutional; yet there were no pending state judicial proceedings in which Stein could raise a challenge to the disciplinary regulations and Gagliardo's threats. Stein was left with the choice of continuing his constitutionally-protected activity and risking disbarment, or ceasing the activity in the face of an illegal threat. Simply put, Gagliardo was using the threat of disciplinary proceedings to coerce compliance with blatantly unconstitutional disciplinary regulations.

On or about June 9, 1983, Stein filed this action in the United States District Court, Northern District of Ohio, Eastern Division, pursuant to 42 U.S.C. 1983, seeking a declaratory judgment, *inter alia,* that his conduct was protected by the First Amendment, and an order restraining Gagliardo from enforcing the unconstitutional regulations.

The District Court, on or about June 24, 1983 dismissed this case based upon the abstention doctrine of *Younger v. Harris,* 401 U.S. 37 (1971) and *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423 (1982). The essence of the District Court's decision was that the court should abstain from exercising jurisdiction because of a "pending state judicial proceeding" concerning the same matters. See Appendix, pages A2, *et seq.* At the time of the dismissal, however, Gagliardo had taken no action against Stein, other than writing the letters referred to above and threatening him. No state judicial proceedings were pending in which Stein could raise his constitutional claims. Indeed, no state judicial proceedings were pending of any kind.

Stein appealed the District Court's judgment to the United States Court of Appeals for the Sixth Circuit. The Court of Appeals rendered its decision on January 25, 1984, affirming the District Court. From the decision of the United States Court of Appeals for the Sixth Circuit, Stein seeks certiorari to this Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The *Younger v. Harris* federal abstention doctrine was born out of concern that Federal Court injunctions might unduly hamper states in their prosecution of criminal law violations. *Younger, supra,* at 51-2. The basic premise of *Younger* abstention is a strong policy against the disruption of pending state judicial proceedings. *Middlesex County Ethics Committee v. Garden State Bar Association, supra.* This Court has extended abstention to non-criminal judicial proceedings where important state issues are involved. *Moore v. Sims,* 442 U.S. 415, 423 (1979).

Nevertheless, federal courts generally have an "unflagging obligation" to exercise their jurisdiction. *Tovar v. Billmeyer,* 609 F.2d 1291, 1293 (9th Cir., 1980). "This obligation is particularly weighty when those seeking a hearing in Federal Court are asserting their right to relief under 42 U.S.C. 1983." *Id.,* at 1293. Although *Younger* and its progeny declare that the principles of federalism and comity sometimes offset this obligation to entertain civil rights suits, the abstention doctrine remains "an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River District v. United States,* 424 U.S. 809, 813 (1976).

Where vital state interests are at stake, Federal Courts generally abstain from disrupting pending state proceedings unless the constitutional claims cannot be litigated. "[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the con-

stitutional claims. . ." *Moore v. Sims, supra,* at 430. Conversely, the *Younger* doctrine does not apply where state judicial proceedings are threatened but have not been commenced. This is because no forum exists in which the constitutional claims can be raised. *Steffel v. Thompson,* 415 U.S. 452 (1974).

In *Steffel,* this Court held that the *Younger* abstention was inapplicable where proceedings are merely threatened, because considerations of equity, comity, and federalism "have little force in the absence of pending state proceedings." *Id.,* at 462. One should not have to choose between the "Scylla of intentionally flouting state . . . [law] and the Charybdis of foregoing what [they] believe to be constitutionally protected activity." *Ibid.*

The decisions of the District Court and the Court of Appeals in this action conflict with *Steffel.* Although *Steffel* concerned a threatened criminal proceeding, and this case concerns a threatened quasi-criminal proceeding[2], they are otherwise indistinguishable. In both cases the litigants faced the threat of terrible punishment in spite of claims that their activity was constitutionally protected. In both cases they were forced to seek redress in Federal Court to avoid the Hobson's choice between intentionally flouting state law (and thereby raising their constitutional claims only in the face of terrible punishment) or foregoing constitutionally protected conduct. In neither case was a state judicial proceeding pending in which the litigants could raise their constitutional claims.[3]

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2. Disbarment proceedings are quasi-criminal in nature, *In Re Ruffalo,* 390 U.S. 544, 551 (1967), as they are "a punishment or penalty imposed on a lawyer." *Ex Parte Garland,* 71 U.S. (4 Wall) 333, 380 (1866).

3. As the record in this case demonstrates, Gagliardo had threatened to begin disbarment proceedings against Stein, but

(Continued on following page)

The only real difference between *Steffel* and this case is the result. This conflict justifies the grant of certiorari to review the judgment below.

2. THE DECISIONS BELOW CREATE A SIGNIFICANT AND SERIOUS IMPEDIMENT TO THE FREE EXERCISE OF PROTECTED FIRST AMENDMENT ACTIVITY.

This case concerns constitutional issues affecting attorneys practicing law in all fifty (50) states. In a series of decisions beginning with *Bates v. Arizona, supra,* and ending with *Bolger v. Youngs Drug Products Co.,* ..... U.S. ....., 77 L. Ed. 2d 469 (1983), this court has clearly established that certain forms of advertising by attorneys are protected by the First Amendment. Nevertheless, old notions die a slow death, and the traditional opposition to legal advertising by some members of the Bar is no exception. The decisions of the District Court and the Court of Appeals below pose a serious threat to any attorney wishing to advertise in a state, such as Ohio, where state authorities are determined to limit the ability to advertise by enforcing disciplinary rules which predate *Bates v. Arizona* and its progeny, and which are blatantly unconstitutional.

This Court has never required individuals to forego what they believe to be constitutionally-protected activity, when faced with the threat of terrible punishment if such conduct continued. Nor has it ever required an in-

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Footnote continued—

had not done so at the time suit was filed or when the case was dismissed. In his letter to Stein, dated June 3, 1983, Gagliardo confirms that he serves a prosecutorial function, and that he has no power to adjudicate constitutional challenges to the Ohio Code of Professional Responsibility. See Note 1, *supra*. This letter is reproduced on page A30 of the Appendix.

dividual to intentionally flout state law to obtain a judicial determination of the constitutionality of the activity in issue. *Steffel v. Thompson, supra.* Yet, the decisions of the courts below will have such an effect.

The decisions of the Court of Appeals and the District Court preclude injunctive and declaratory relief pursuant to 42 U.S.C. 1983 where state disciplinary proceedings have not been commenced, only threatened. Thus, a state disciplinary officer in any of the fifty (50) states can effectively prevent an attorney from engaging in protected First Amendment activity by *threatening* to begin disbarment proceedings, thereby leaving the attorney with the unenviable choice of continuing protected conduct and facing the professional and personal stigma of disbarment proceedings, or knuckling under to the unconstitutional threats of the state disciplinary officer by curtailing First Amendment activity that this Court has already held to be proper. Given such a choice, many attorneys will surely cease protected activity because they cannot otherwise obtain a judicial determination as to the propriety of the activity in question, and do not wish to risk losing their license to practice law in disbarment proceedings, where such a determination could be had. Only an action for declaratory and injunctive relief pursuant to 42 U.S.C. 1983 protects the rights of all concerned by permitting a judicial resolution of the controversy, while eliminating the possibility of an unconstitutional result obtained extra-judicially through the use of unconstitutional threats.

These are the only Circuit Court and District Court decisions which have addressed this question. Consequently, these decisions, if permitted to stand, would provide encouragement and authority for the disciplinary officer in any of the fifty (50) states to unconstitutionally restrict advertising which this Court has specifically and

clearly authorized as constitutionally protected First Amendment expression. This tension with clearly established legal principles justifies the grant of certiorari to review the judgment below.

3. THE DECISIONS BELOW IGNORE THE UNDISPUTED FACTS OF THIS CASE.

Lastly, the decisions of the Court of Appeals and the District Court below ignore the undisputed facts of this case. The record clearly demonstrates that Gagliardo, being only the Ohio Disciplinary Counsel, serves a prosecutorial function—in that he prosecutes attorneys who allegedly violate the Ohio Code of Professional Responsibility. He has no power to adjudicate constitutional challenges to these disciplinary regulations. In a letter to Stein dated June 3, 1983 (App., p. A30), Gagliardo clearly and succinctly enunciated his function: "[T]his office has no authority to declare a rule adopted by the Ohio Supreme Court unconstitutional. The function of this office is limited . . . [to investigate and thereafter] . . . file a complaint with the Board of Commissioners on Grievances and Discipline."

At the time that Stein filed suit in District Court, the only action that Gagliardo had taken was to advise Stein in writing that he would file disbarment proceedings unless Stein agreed to cease what he believed to be constitutionally protected First Amendment expression. No formal complaint had been filed by Gagliardo with the Ohio Board of Commissioners on Grievances and Discipline.

Based upon these uncontroverted facts, the District Court and the Court of Appeals abstained from deciding this case upon its merits, relying upon *Middlesex County Ethics Committee v. Garden State Bar Association, supra.*

In *Middlesex County Ethics Committee*, this Court held that abstention was proper only where the federal suit was filed *after* state disciplinary proceedings had begun.

The lower court's decisions in this case make no mention of *Steffel v. Thompson, supra*, wherein this Court held that a District Court *cannot* abstain from exercising jurisdiction where state judicial proceedings are merely threatened.

Given that state disbarment proceedings were only threatened when Stein filed suit, it would appear that *Steffel*, and not *Middlesex*, controls the disposition of this case. The refusal of the Circuit Court and the District Court to respect these uncontroverted facts, in light of *Steffel*, cannot be justified.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully prays the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and to review and decide this case.

RELIEF ULTIMATELY SOUGHT

Petitioner believes that this Court should rule that the District Court improperly abstained from deciding this case upon the merits, and that the decisions of the Court of Appeals and the District Court must, therefore, be reversed, with instructions to hear and determine this cause.

Respectfully submitted,

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APPENDIX

OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed January 25, 1984)

No. 83-3453

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

SHELDON STEIN,
Plaintiff-Appellant,

vs.

ANGELO GAGLIARDO,
Defendant-Appellee.

ORDER

BEFORE: EDWARDS, MERRITT and JONES, *Circuit Judges.*

This cause having come on to be heard upon the record, the briefs and the oral argument of the parties, and upon due consideration thereof,

The Court finds that no prejudicial error intervened in the judgment and proceedings in the district court, and IT IS THEREFORE ORDERED that said judgment be, and it hereby is, affirmed.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 24, 1983)

C83-2415

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHELDON STEIN,
Plaintiff,

vs.

ANGELO GAGLIARDO,
Defendant.

MEMORANDUM AND ORDER

Plaintiff, an attorney and member of the bar of the State of Ohio, has caused an advertisement for legal services to be placed in the Cleveland, Ohio Yellow Pages concerning the availability of legal services for individuals with financial problems. On April 25, 1983 the Defendant, Disciplinary Counsel of the Supreme Court of Ohio, advised plaintiff that this advertisement violated Rule 2-101(B) of the Ohio Code of Professional Responsibility and indicated that disciplinary action would be commenced unless plaintiff voluntarily discontinued use of the advertisement. After receiving plaintiff's reply that he believed that this advertisement was [2] a form of commercial speech protected by the First Amendment to the United

States Constitution, defendant again notified plaintiff that disciplinary action would be commenced within five (5) days unless plaintiff agreed to stop using the advertisement. Plaintiff has also sent a copy of the Yellow Pages advertisement to selected individuals whom it was believed could benefit from the receipt of the information. The defendant's letter of April 25, 1983 contained notice that mailing of this advertisement constituted a violation of Rule 2-103 and 2-104 of the Ohio Code of Professional Responsibility. The plaintiff's reply and defendant's following letters also applied to the mailed advertisement.

Plaintiff has commenced this action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§2201 and 2202 seeking an order enjoining defendant from enforcing Rules 2-101(B), 2-103 and 2-104 against plaintiff and a declaratory judgment that the enumerated rules be found unconstitutional under the First and Fourteenth Amendments to the United States Constitution. This matter is before the Court upon plaintiff's motion for a temporary restraining order and defendant's motion to dismiss for lack of jurisdiction. At the hearing on the motions the Court overruled defendant's motion to dismiss as it pertained to the issue of improper venue under 28 U.S.C. §1391(b). **[3]** Defendant then raised the issue of abstention according to *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

The *Younger* case established a doctrine of equitable restraint whereby the federal courts restrain from interfering with pending state judicial proceedings absent extraordinary circumstances. Recently the United States Supreme Court applied the *Younger* doctrine to a state disciplinary proceedings against an attorney in *Middlesex County Ethics Committee v. Garden State Bar Association* ..... U.S. ....., 102 S.Ct. 2515, 73 L.Ed. 2d 116 (1982). The

Court set forth three (3) criteria to be used in determining whether to apply the abstention doctrine to a state disciplinary proceeding. First, do state bar disciplinary hearings within the constitutionally prescribed jurisdiction of the State Supreme Court constitute an ongoing state judicial proceeding; second, do the proceedings implicate important state interests; and third, is there an adequate opportunity in the state proceedings to raise constitutional challenges.

Under Ohio law, the Ohio Supreme Court has the exclusive and absolute authority over attorney disciplinary proceedings. Article IV §§2(B)(1)(g), 5(B) of the Ohio Constitution, *Smith v. Kates*, 46 Ohio St 2d 263, 348 NE 2d 320 **[4]** (1976). The Supreme Court Rules for the Government of the Bar of Ohio make the Code of Professional Responsibility binding on attorneys and provides a disciplinary procedure for violations. (Gov. R. IV and V). The position of Disciplinary Counsel has been created by the Ohio Supreme Court. According to Gov. R. V the Board of Commissioners, also created by the Supreme Court, receives complaints of misconduct and may refer any matters coming to its attention to the Disciplinary Counsel for investigation. All complaints alleging violations of DR 2-101 must be referred to the Disciplinary Counsel for investigation, filing of formal complaint and prosecution of the formal complaint. The process begins when the Board of Commissioners receives the initial complaint of misconduct and refers it to the Disciplinary Counsel who begins investigation. Therefore the Ohio disciplinary procedure must be considered part of the ongoing judicial proceedings of the Ohio Supreme Court. See *Coogan v. Cincinnati Bar Association*, 431 F. 2d 1209 (6th Cir. 1970).

The second criteria under *Middlesex County*, is that an important state interest must be implicated. The State

of Ohio recognizes the importance of regulating the practice of law. The Ohio Constitution grants the Ohio Supreme Court the jurisdiction to regulate admission to the practice of law, [5] enforce discipline among members of the bar, and all other matters relating to the practice of law including registration of attorneys. (Art. IV §2(B)(1)(g) of the Ohio Constitution, Gov. R. VII). In addition, the State's interest is demonstrated by the fact that the Disciplinary Counsel of the Ohio Supreme Court is named as a party in this case.

Finally, there must [sic] an adequate opportunity in the state proceeding to raise constitutional questions. According to Gov. R. V, upon receipt of the Commissioner's report, the Supreme Court issues an order to the respondent attorney to show cause why the report should not be confirmed. The Respondent then has twenty (20) days to object to the Commissioner's recommendations. When timely objections are filed the Supreme Court conducts a hearing wherein the respondent is given an opportunity to raise constitutional challenges. *Cleveland Bar Association v. Pleasant*, 167 Ohio St 325, 148 NE 2d 493 (1958). The Court finds that all the criteria set forth in *Middlesex County* are satisfied requiring this Court to abstain from determining the issues in this case.

Accordingly, the plaintiff's motion for temporary restraining order is DENIED. Defendant's motion to dismiss is GRANTED. The complaint is hereby dismissed.

IT IS SO ORDERED.

/s/ GEORGE W. WHITE
U.S. District Judge

ORDER OF THE UNITED STATES DISTRICT COURT

(Filed June 24, 1983)

C83-2415

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

SHELDON STEIN,
Plaintiff,

v.

ANGELO GAGLIARDO,
Defendant.

ORDER

Pursuant to the Court's Memorandum and Order filed June 24, 1983,

IT IS ORDERED that plaintiff's complaint is hereby dismissed at plaintiff's costs.

/s/ GEORGE W. WHITE
United States District Judge

OHIO CODE OF PROFESSIONAL RESPONSIBILITY

(Excerpts)

DISCIPLINARY RULES

DR 2-101. Publicity

(A) A lawyer shall not, on behalf of himself, his partner, associate or any other lawyer affiliated with him or his firm, use, or participate in the use of, any form of public communication containing a false, fraudulent, misleading, deceptive, self-laudatory or unfair statement or claim.

(B) In order to facilitate the process of informed selection of a lawyer by potential consumers of legal services, a lawyer may publish or broadcast, subject to DR 2-103, in print media or over radio or television. Print media includes only regularly published newspapers, magazines and other periodicals, classified telephone directories, city, county and suburban directories, law directories and law lists. The information disclosed by the lawyer in such publication or broadcast shall comply with DR 2-101(A) and be presented in a dignified manner without the use of drawings, illustrations, animations, portrayals, dramatizations, slogans, music, lyrics or the use of pictures, except the use of pictures of the advertising lawyer, or the use of a portrayal of the scales of justice. Only the following information may be published or broadcast:

(1) Name, including name of law firm and names of professional associates, addresses and telephone numbers;

(2) One or more fields of law in which the lawyer or law firm is available to practice, but may not include a statement that the practice is limited to or concentrated in one or more fields of law or that the lawyer or law firm specializes in a particular field of law unless authorized under DR 2-105;

(3) Age;

(4) Date of admission to the bar of a state, or federal court or administrative board or agency;

(5) Schools attended, with dates of graduation, degrees and other scholastic distinctions;

(6) Public or quasi-public offices;

(7) Military service;

(8) Published legal authorships;

(9) Holding scientific, technical and professional licenses, and memberships in such associations and societies;

(10) Foreign language ability;

(11) Whether credit cards or other credit arrangements are accepted;

(12) Office and telephone answering service hours;

(13) Fee for an initial consultation;

(14) Availability upon request of a written schedule of fees or an estimate of the fee to be charged for specific services;

(15) Contingent fee rates subject to DR 2-106(C), provided that the statement discloses whether percentages are computed before or after deduction of court costs and expenses;

(16) Hourly rate, provided that the statement discloses that the total fee charged will depend upon the number of hours which must be devoted to the particular matter to be handled for each client and the client is entitled without obligation to an estimate of the fee likely to be charged, in print size at least equivalent to the largest print used in setting forth the fee information;

(17) Fixed fees for specific legal services;

(18) Legal teaching positions, memberships, offices, committee assignments, and section memberships in bar associations;

(19) Memberships and offices in legal fraternities and legal societies;

(20) In law directories and law lists only names and addresses of references, and, with their written consent, names of clients regularly represented.

(C) If the advertisement is communicated to the public over radio or television, it shall be prerecorded, approved for broadcast by the lawyer, and a recording of the actual transmission shall be retained by the lawyer.

(D) If a lawyer advertises a fee for a service, such service must be rendered for no more than the fee advertised.

(E) Unless otherwise specified in the advertisement, if a lawyer publishes any fee information authorized under DR 2-101(B) in a publication that is published more frequently than one time per month, the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such publication. If a lawyer publishes any fee information

authorized under DR 2-101(B) in a publication that is published once a month or less frequently, he shall be bound by any representation made therein until the publication of the succeeding issue. If a lawyer publishes any fee information authorized under DR 2-101(B) in a publication which has no fixed date for publication of a succeeding issue the lawyer shall be bound by any representation made therein for a reasonable period of time after publication but in no event less than one year.

(F) Unless otherwise specified, if a lawyer broadcasts any fee information authorized under DR 2-101(B), the lawyer shall be bound by any representation made therein for a period of not less than 30 days after such broadcast.

(G) A lawyer shall not directly or indirectly compensate or give any thing of value to representatives of the press, radio, television, or other communication medium in anticipation of or in return for professional publicity in a news item.

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DR 2-103. Recommendation of Professional Employment

(A) A lawyer shall not recommend employment, as a private practitioner, of himself, his partner, or associate to a non-lawyer who has not sought his advice regarding employment of a lawyer.

(B) A lawyer shall not compensate or give any thing of value to a person or organization to recommend or secure his employment by a client, or as a reward for having made a recommendation resulting in his employment by a client, except that he may pay the

usual and reasonable fees or dues charged by any of the organizations listed in DR 2-103(D).

(C) A lawyer shall not request a person or organization to recommend or promote the use of his services or those of his partner or associate, or any other lawyer affiliated with him or his firm, as a private practitioner, except that:

(1) He may request referrals from a lawyer referral service operated, sponsored, or approved by a bar association and may pay its fees incident thereto.

(2) He may cooperate with the legal service activities of any of the offices or organizations enumerated in DR 2-103 (D) (1) through (4) and may perform legal services for those to whom he was recommended by it to do such work if:

(a) The person to whom the recommendation is made is a member or beneficiary of such office or organization; and

(b) The lawyer remains free to exercise his independent professional judgment on behalf of his client.

(D) A lawyer shall not knowingly assist a person or organization that furnishes or pays for legal services to others to promote the use of his services or those of his partner or associate or any other lawyer affiliated with him or his firm except as permitted in DR 2-101(B). However, this does not prohibit a lawyer or his partner or associate or any other lawyer affiliated with him or his firm from being recommended, employed or paid by, or cooperating with, assisting and providing legal services for, one of the following offices or organizations that promote the use of his services or those of his partner or associate

or any other lawyer affiliated with him or his firm if there is no interference with the exercise of independent professional judgment in behalf of his client:

(1) A legal aid office or public defender office:

(a) Operated or sponsored by a duly accredited law school.

(b) Operated or sponsored by a bona fide nonprofit community organization.

(c) Operated or sponsored by a governmental agency.

(d) Operated, sponsored, or approved by a bar association.

(2) A military legal assistance office.

(3) A lawyer referral service operated, sponsored, or approved by a bar association.

(4) Any bona fide organization that recommends, furnishes or pays for legal services to its members or beneficiaries provided the following conditions are satisfied:

(a) Such organization, including any affiliate, is so organized and operated that no profit is derived by it from the rendition of legal services by lawyers, and that, if the organization is organized for profit, the legal services are not rendered by lawyers employed, directed, supervised or selected by it except in connection with matters where such organization bears ultimate liability of its member or beneficiary.

(b) Neither the lawyer, nor his partner, nor associate, nor any other lawyer affiliated with

him or his firm, nor any non-lawyer, shall have initiated or promoted such organization for the primary purpose of providing financial or other benefit to such lawyer, partner, associate or affiliated lawyer.

(c) Such organization is not operated for the purpose of procuring legal work or financial benefit for any lawyer as a private practitioner outside of the legal services program of the organization.

(d) The member or beneficiary to whom the legal services are furnished, and not such organization, is recognized as the client of the lawyer in the matter.

(e) Any member or beneficiary who is entitled to have legal services furnished or paid for by the organization may, if such member or beneficiary so desires, select counsel other than that furnished, selected or approved by the organization; provided, however, that the organization shall be under no obligation to pay for the legal services furnished by the attorney selected by the beneficiary unless the terms of the legal services plan specifically provide therefor.

Every legal services plan shall provide that any member or beneficiary may assert a claim that representation by counsel furnished, selected or approved by the organization would be unethical, improper or inadequate under the circumstances of the matter involved; the plan shall provide for adjudication of such a claim and appropriate relief through substitution of counsel or through

providing that the beneficiary may select counsel and the organization shall pay for the legal services rendered by such counsel to the extent that such services are covered under the plan and in an amount equal to the cost which would have been incurred by the plan if the plan had furnished designated counsel.

(f) The lawyer does not know or have cause to know that such organization is in violation of applicable laws, rules of court and other legal requirements that govern its legal service operations.

(g) Such organization has filed with the Supreme Court of Ohio on or before January 1 of each year a report with respect to its legal service plan, if any, showing its terms, its schedule of benefits, its subscription charges, agreements with counsel, and financial results of its legal service activities or, if it has failed to do so, the lawyer does not know or have cause to know of such failure.

DR 2-104. Suggestion of Need of Legal Services

(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:

(1) A lawyer may accept employment by a close friend, relative, former client (if the advice is germane to the former employment), or one whom the lawyer reasonably believes to be a client.

(2) A lawyer may accept employment that results from his participation in activities designed to educate laymen to recognize legal problems, to make intelligent selection of counsel, or to utilize available legal services if such activities are conducted or sponsored by any of the offices or organizations enumerated in DR 2-103(D) (1) through (5), to the extent and under the conditions prescribed therein.

(3) A lawyer who is recommended, furnished or paid by a qualified legal assistance organization enumerated in DR 2-103(D) (1) through (4) may represent a member or beneficiary thereof, to the extent and under the conditions prescribed therein.

(4) Without affecting his right to accept employment, a lawyer may speak publicly or write for publication on legal topics so long as he does not emphasize his own professional experience or reputation and does not undertake to give individual advice.

(5) If success in asserting rights or defenses of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, but shall not seek, employment from those contacted for the purpose of obtaining their joinder.

DR 2-105. Limitation of Practice

(A) A lawyer shall not hold himself out publicly as a specialist or as limiting his practice, except as permitted under DR 2-102(A) (6) or as follows:

(1) A lawyer admitted to practice before the United States Patent Office may use the designation

"Patents," "Patent Attorney," or "Patent Lawyer," or any combination of those terms, on his letterhead and office sign. A lawyer engaged in the trademark practice may use the designation "Trademarks," "Trademark Attorney," or "Trademark Lawyer," or any combination of those terms, on his letterhead and office sign, and a lawyer engaged in the admiralty practice may use the designation "Admiralty," "Proctor in Admiralty," or "Admiralty Lawyer," or any combination of those terms, on his letterhead and office sign.

(2) A lawyer may permit his name to be listed in lawyer referral service offices according to the fields of law in which he will accept referrals.

(3) A lawyer available to act as a consultant to or as an associate of other lawyers in a particular branch of law or legal service may distribute to other lawyers and publish in legal journals a dignified announcement of such availability, but the announcement shall not contain a representation of special competence or experience. The announcement shall not be distributed to lawyers more frequently than once in a calendar year, but it may be published periodically in legal journals.

(4) A lawyer who is certified as a specialist in a particular field of law or law practice by the authority having jurisdiction under state law over the subject of specialization by lawyers may hold himself out as such specialist but only in accordance with the rules prescribed by that authority.

* * * * *

If you're hopelessly overburdened by debts . . .

Can personal bankruptcy help you?

It might possibly be the answer. Individuals and couples can file for bankruptcy just as businesses can. If you qualify and are declared legally bankrupt, you are freed of most old debts and can have a fresh new start in life. A new law permits you to often keep your house and automobile and get a fresh start. Consult with us to learn if you are eligible. No cost or obligation.

SHELDON STEIN

ATTORNEY-AT-LAW

696-7449

1226 STANDARD BLDG
corner St Clair & Ontario
(Downtown across from Justice Center)

YOU'LL FIND US FAST IN YOUR CLEVELAND YELLOW PAGES

Bell System Yellow Pages

If you're hopelessly overburdened by debts . . .

Can personal bankruptcy help you?

It might possibly be the answer. Individuals and couples can file for bankruptcy just as businesses can. If you qualify and are declared legally bankrupt, you are freed of most old debts and can have a fresh new start in life. A new law permits you to often keep your house and automobile. Consult with us to learn if you are eligible. No cost or obligation.

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corner St Clair & Ontario
(Downtown across from Justice Center)

DISCIPLINARY COUNSEL
of the
SUPREME COURT OF OHIO

ANGELO J. GAGLIARDO
COUNSEL

CHARLES W. KETTLEWELL
KATHRYN HALLER
CARL J. CORLETZI
ASSISTANT COUNSEL

175 South Third St.
Columbus, Ohio 43215
614/461-0256

CHESTER C. HAYTH
INVESTIGATOR

CERTIFIED MAIL

RETURN RECEIPT REQUESTED

April 25, 1983

PERSONAL & CONFIDENTIAL

Sheldon Stein, Esq.
1226 Standard Building
Cleveland, Ohio 44113

Re: MISC. 1983
Yellow Pages
Advertisement

Dear Mr. Stein:

Please be advised that this office in is receipt of your Cleveland Yellow Pages advertisement and your envelope to Ms. Joanne Knapp with your Yellow Pages advertisement enclosed. The use of advertisements should be examined in connection with the decisions of *Bates v. Arizona*, 51 Ohio Misc. 2d 1; 433 U.S. 350 (1977); *In the Manner of R.M.J.*, 102 S. Ct. 929; Disciplinary Rule 2-101(A)

and (B)(1) through (20); and Disciplinary Rule 2-103. The Supreme Court of Ohio has not amended any of the Rules in the Ohio Code of Professional Responsibility pertaining to advertising and related subjects in the Code. It is our view that the Ohio Code provisions are in full force and effect except those specific statements made by The Supreme Court of the United States in *Bates* and *R.M.J.*

Disciplinary Rule 2-101(B) lists the twenty items that may be published or broadcasted. It would seem that your advertisement does not comport with the advertisement criteria of Disciplinary Rule 2-101(B).

Furthermore, your Yellow Pages advertisement was mailed to Ms. Knapp without her request. The envelope shows bulk rate postage and your return address but without your name for the return address. The unsolicited mailing of your advertisement may be a violation of Disciplinary Rule 2-103 and Disciplinary Rule 2-104 and therefore should be carefully examined by you to see that there are no potential violations in the future.

Please advise this office by written statement within ten days of your receipt of this letter of your intentions to comply with the Code of Professional Responsibility. Thank you for your anticipated cooperation in this matter.

Very truly yours,

AJG
ANGELO J. GAGLIARDO
Disciplinary Counsel

By: /s/ Carl J. Corletzi
Carl J. Corletzi

CJC/sam

SHELDON STEIN
ATTORNEY AND COUNSELOR AT LAW
Suite 1226 - Standard Building
Post Office Box 5606
Cleveland, Ohio 44101

216 696-7449

May 5, 1983

Mr. Carl Corletzi, Esq.
State Disciplinary Counsel
175 South Third Street
Columbus, Ohio 43215

Re: Professional Advertising

Dear Mr. Carletzi:

This letter is in response to your letter of April 23, 1983, and our subsequent telephone conversation concerning same.

It has never been my intention to do anything which can be construed as being harmful to the general public, and, indeed, I have always conducted my practice according to the highest standards of our profession.

That is why I was dismayed to learn that a brother attorney, unhappy or perhaps jealous of the considerable amount of people I have counseled in the past year about debt problems, has seen fit to ask the disciplinary counsel to substantially limit my ability to disseminate information to the general public as to their legal rights.

I fully understand that old notions die a hard death. I also understand that rules and regulations concerning the practice of law are based upon ancient ideas. The traditional ban on advertising originated as a rule of etiquette

and not as a rule of ethics. Early lawyers viewed the law as a form of public service rather than as a means of earning a living, and looked down upon commercialism or "trade" as unseemly. Eventually, the attitude towards advertising fostered by this view evolved into an aspect of the ethics of the profession. *Bates vs. State Bar of Arizona*, 433 U.S. 350, 371 (1977). "Since the belief that lawyers are somehow "above" trade has become an anachronism, the historical foundation for the advertising restraint has crumbled." *Id.*, at 371-2. Indeed, the Supreme Court has recognized the importance that advertising plays in today's society ". . . [advertising] serves to inform the public of the availability, nature, **[2]** and prices of products and services, and thus plays an *indispensable* role in the allocation of resources in a free enterprise system. . . In short, such [advertising] serves individual and societal interests in assuring informed and reliable decision making. . ." *Bates vs. State Bar of Arizona, supra*, at 364.

Therefore, I was saddened to learn through your letter and our telephone conversation that you are questioning the propriety of my ad. It is truthful and nondeceptive and it fulfills a valuable function in advising the public of the availability of legal service.

The yellow pages advertisement has been in publication for over three years, and in all that time I have never received a complaint from the public or the organized bar that the ad was deceptive, misleading, or otherwise objectionable. To the contrary, many people have seen the ad in the yellow pages and in responding to same, have received competent legal advice. The response from fellow lawyers has been very favorable. I fail to see how anything which increases the public's awareness of their legal rights can be considered harmful.

Furthermore, the Ohio State Bar Association has for a long time provided pamphlets to attorneys for distribution and given them to the general public. These pamphlets describe the law in areas of consumer interest. There seems to be little reason to prohibit a lawyer from doing that which the Bar Association encourages.

Lastly, the ad is based upon a model advertisement furnished by the American Bar Association, (see enclosed). It is inconceivable that an objection could be raised to that which the American Bar Association *encourages* attorneys to make use of. I was only following in good faith the ethical guidelines promulgated by this organization.

It is beyond doubt that a state may not prohibit an attorney from advertising. In *Bates vs. State Bar of Arizona, supra,* the court held that lawyers advertising was a form of commercial speech protected by the First Amendment, and that "advertising by attorneys may not be subjected to blanket suppression." 433 U.S. at 383. Although *Bates* concerned newspaper **[3]** advertising, the court indicated that it applied with equal force to mail circulations: "The Court speaks specifically only of newspaper advertising, but it is clear that today's decision cannot be confined on a principled basis to price advertisement in newspapers. No distinction can be drawn between newspapers and a rather broad spectrum of other means - for example, magazines, signs in buses and subways, posters, handbills, and *mail circulations.*" *Bates vs. State Bar of Arizona, supra,* at 402, fn. 12 (Powell, J., concurring.)

Thereafter, the court decided *In Re R.M.J.*, 455 U.S. 191 (1982), a case concerning the extent to which lawyer advertising may be regulated. The attorney in *R.M.J.* was the subject of disciplinary proceedings after having

sent an unsolicited advertisement to potential clients. The mailing was truthful and not misleading, yet violated the Missouri restrictions upon what could be placed in an advertisement. The court condemned as constitutionally impermissible the attempted state suppression of truthful advertising by mail.

R.M.J. gives a broad sweep of protection to the exercise of commercial speech by lawyers. Its message is clear: "Truthful advertising related to lawful activities is entitled to the protections of the First Amendment. But when the particular content or method of advertising suggests that it is inherently misleading or when experience has proven that, in fact, such advertising is subject to abuse, the State may impose appropriate restrictions. Misleading advertising may be prohibited entirely. . . Although the potential for deception and confusion is particularly strong in the content of advertising professional services, restrictions upon such advertising may be no broader than reasonably necessary to prevent deception." 455 U.S. at 203.

The Supreme Court of Oklahoma summarized *R.M.J.* as follows: (1) Advertising inherently misleading or proven to be misleading in practice may warrant absolute state prohibition; (2) Non misleading advertising may be regulated only where a substantial state interest exists. See *State, ex rel. Oklahoma Bar Association vs. Schaffer*, 648 P. 2d, 355 (Okl., 1982) See, also, *Disciplinary Proceedings Against Markus*, 320 N.W. 2d 806 (Wisc. 1982).[1]

[4] Your attention is respectfully directed to the case of *Kentucky Bar Association vs. Stuart*, 568 S.W., 2d 933 (Ky., 1978) and the very learned decision of the New York

---

1. The advertisement approved by the Wisconsin Supreme Court in *Markus* was much more egregious than mine. It is attached as Exhibits "B" and "C".

high court in *Koffler vs. Joint Bar Association*, 421 N.E. 2d 927 (N.Y., 1980), both of which approved nondeceptive direct mail advertising by attorneys.

My advertising which currently appears in the yellow pages is neither misleading nor deceptive. Based upon *Bates* and *R.M.J.*, its publication does not create a potential for harm to the general public and is therefore entitled to First Amendment protection. Therefore, I respectfully conclude that this advertisement is properly before the public.

Similarly, I do not believe that the mailing of this advertisement to potential clients violates the precepts of *Bates*, *R.M.J.*, *Stuart* and *Koffler*. Nor can the possibility of invasion of privacy or the possibility of overbearing persuasion, both condemned in *Ohralik vs. Ohio State Bar Association*, 436 U.S. 447 (1978), be sufficiently possible in mail solicitation to justify banning it. As the court in *Koffler* noted, citing *Consolidated Edison Co. vs. Public Service Comm.*, 447 U.S. 530, 542-3, "a recipient of a lawyer's letter may escape exposure to objectional material simply by transferring . . . [it] from envelope to wastebasket."

I similarly conclude, therefore, that a direct mail advertisement system, using the aforesaid yellow page advertisement, is similarly permissible under *Bates* and *R.M.J.* As I have indicated, I have stopped making use of this advertisement pending resolution of this matter. I would, therefore, appreciate your prompt advice herein.

Very truly yours,

SHELDON STEIN

SS/tg
Enc.

DISCIPLINARY COUNSEL
of the
SUPREME COURT OF OHIO

ANGELO J. GAGLIARDO
COUNSEL

CHARLES W. KETTLEWELL
KATHRYN HALLER
CARL J. CORLETZI
ASSISTANT COUNSEL

175 South Third St.
Columbus, Ohio 43215
614/461-0256

CHESTER C. HAYTH
INVESTIGATOR

May 16, 1983

PERSONAL & CONFIDENTIAL

Sheldon Stein, Esq.
Suite 1226, Standard Building
P.O. Box 5605
Cleveland, Ohio 44101

Re: Legal Service Advertising
MISC. 1983

Dear Mr. Stein:

Please be advised that this office is in receipt of your May 5, 1983, letter with attachments. This office does not have the authority under Gov. Rule V to issue advisory opinions regarding legal service advertisements. Our authority is to investigate and file a formal complaint when there has been a violation of the Code of Professional Responsibility.

This office is not restricted by any actions or advice by the American Bar Association or other states. The Su-

preme Court of Ohio has not amended DR 2-101 and DR 2-102 since the announcement of *Bates v. Arizona* and *In re R.M.J.* by the Supreme Court of the United States, so that the Ohio rules as to legal service advertisements and professional announcements are still in effect in Ohio as enacted subject to those two U.S. Supreme Court decisions.

Furthermore, it is our position that the manner in which your advertisement was sent to Ms. Knapp is a violation of DR 2-103 (solicitation) and DR 2-104 (employment resulting from unsolicited advice). We request that you comply with the current Ohio Supreme Court Rules of Professional Responsibility unless you wish to test the Ohio rules through disciplinary proceedings as provided for in Gov. Rule V.

Please advise this office in writing of your intention to comply with the Code of Professional Responsibility in all of its aspects in carry out your professional responsibilities. Thank you for your anticipated cooperation.

Very truly your,

(AJG)
ANGELO J. GAGLIARDO
Disciplinary Counsel

By: /s/ CARL J. CORLETZI
Carl J. Corletzi, Assistant
Disciplinary Counsel

CJC/sam

SHELDON STEIN
ATTORNEY AND COUNSELOR AT LAW
Suite 1226 - Standard Building
Post Office Box 5606
Cleveland, Ohio 44101

216 696-7449

June 1, 1983

Mr. Carl Corletzi, Esq.
State Disciplinary Counsel
175 South Third Street
Columbus, Ohio 43215

Re: Professional Advertising

Dear Mr. Corletzi:

I am in receipt of your letter of May 16, 1983, in which you again ask the undersigned to advise in writing of my intention to comply with the Code of Professional Responsibility.

At this point, I do not understand your position. Initially, you asked that I examine my advertisement procedures in light of the Code of Professional Responsibility and the recent decision in *Bates vs. Arizona* and *In Re R.M.J.*

In response thereto, I sent you a letter citing case authority for the proposition that my conduct is proper, and indicating that other courts have invalidated similar disciplinary provisions in other states. Furthermore, I pointed out specific language in both *Bates* and *R.M.J.* which cast serious doubt upon the validity of the specific regulations that you claim I have violated. Now you have indicated that I must cease making use of my advertisement for any

purpose whatsoever, apparently ignoring the authority made available to you.

I have no desire to be subjected to disciplinary proceedings and to have to undergo the extreme embarrassment and humiliation that naturally follows. Nor do I wish to have to retain counsel, at considerable expense, in defending such proceedings. Thus, your suggestion that I test the disciplinary code by subjecting myself to a disciplinary proceeding is unacceptable in that it exacts too high a price for exercising my constitutional rights.

[2] Similarly, I will suffer a considerable loss of income if I cease using my yellow pages ad. I feel very strongly about, and believe in, the Constitution and the Bill of Rights, and the whole idea of being subject to punishment and being forced to forego a considerable amount of income solely because I have exercised my First Amendment rights is very upsetting to me.

In sum, I wish to avoid litigation if at all possible, and ask that you reconsider your decision or suggest some other method of resolving this dispute. Any ensuing court action would be costly for all concerned, and would reflect adversely upon the undersigned, your office, and our profession in general. While your office may not have the authority to issue advisory opinions, it is your obligation not to take any action upon which it is known or reasonably should be known, violates rights guaranteed by the Constitution.

Thank you for your consideration in this matter.

Very truly yours,

SHELDON STEIN

SS/tg

DISCIPLINARY COUNSEL
of the
SUPREME COURT OF OHIO

June 3, 1983

ANGELO J. GAGLIARDO
COUNSEL

CHARLES W. KETTLEWELL
KATHRYN HALLER
CARL J. CORLETZI
ASSISTANT COUNSEL

175 South Third St.
Columbus, Ohio 43215
614/461-0256

CHESTER C. HAYTH
INVESTIGATOR

Sheldon Stein, Esq.
Standard Building
Suite 1226
P.O. Box 5606
Cleveland, Ohio 44101

Re: MISC. 1983
LSA

Dear Mr. Stein:

This office has no authority to declare a rule adopted by the Ohio Supreme Court unconstitutional. The function of this office is limited to investigate alleged violations of the Code of Professional Responsibility and upon determining that cause exists to file a complaint with the Board of Commissioners on Grievances and Discipline.

Your attention is directed to the provisions of Government of the Bar Rule V as promulgated by the Ohio Supreme Court.

Unless you advise this office that you are going to comply with our letters of April 25, 1983 and May 16, 1983 this office will have no alternative but to file a formal complaint against you for the reasons indicated therein.

Please advise this office within five (5) days of receipt of this letter what your intentions are in this matter.

Very truly yours,

/s/ ANGELO J. GAGLIARDO
Angelo J. Gagliardo
Disciplinary Counsel

AJG/ns

Office - Supreme Court, U.S.
FILED
MAY 17 1984
ALEXANDER L. STEVAS
CLERK

No. 83-1709

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SHELDON STEIN,

Petitioner,

vs

ANGELO J. GAGLIARDO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ANGELO J. GAGLIARDO
Disciplinary Counsel for the
Supreme Court of Ohio
Counsel of Record

CARL J. CORLETZI
Office of Disciplinary Counsel
Staff Counsel

Office of Disciplinary Counsel
175 S. Third St., Suite 280
Columbus, Ohio 43215
(614) 461-0256

COUNSEL FOR RESPONDENT

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

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STATEMENT OF THE CASE

On April 25, 1983, Respondent informed Petitioner by letter that Petitioner's Yellow Pages advertisement and the unsolicited mailing of the advertisement to Ms. Joanne Knapp may have violated the Code of Professional Responsibility. April 25, 1983 letter is reproduced at page A-19 in Petitioner's Appendix. Further communications occured between Petitioner and Respondent regarding compliance with the Code of Professional Responsibility on May 5, 1983, May 16, 1983, June 1, 1983 and June 3, 1983. Letters of May 5, 16, 1983 and June 1, 3, 1983 are reproduced at pages A-21 to A-31 in Petitioner's Appendix.

Prior to responding to the Disciplinary Counsel's request to withdraw the offending advertisement, the Petitioner on June 9, 1983 filed an action for a Temporary Restraining Order, Preliminary Injunction, Declaratory Judgment and a Writ of Prohibition in the U.S. District Court Northern District of Ohio Eastern Division. The District court by Order filed on June 24, 1983 dismissed Petitioner's action by invoking the doctrine of abstention as enunciated in *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L.Ed 2d 669 (1971) and *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed 2d 116 (1982). The District Court's Order is reproduced on Page A-2 in Petitioner's Appendix.

Petitioner through numerous communications was well aware that state disciplinary proceedings were pending and that filing of a formal complaint would be issued against Petitioner unless he agreed to withdraw his ad. A formal complaint was filed by Respondent before the Board of Commissioners on Grievances and Discipline on July 1, 1983, charging that Petitioner violated Disciplinary Rules (DR's) DR 2-103 (A); DR 2-102 (A) (2); DR 2-101 (B) (1); DR 2-105 (A); DR 2-104 (A) and DR 1-102 (A) (1). DR's 2-101, 2-103, 2-104, 2-105 are reproduced on Pages A 7 to A

16 of Petitioner's Appendix. DR's 1-102 and 2-102 are reproduced on pages A-1 to A-4 of Respondent's Appendix.

From the District Court's decision the Petitioner filed an appeal with the U.S. Court of Appeals for the Sixth Circuit. The Court of Appeals rendered its decision at the hearing from the bench under Rule 19 C which upheld the District Court's decision finding that no prejudicial error intervened in the judgment and proceedings in the District Court and ordered that the judgment of the District Court be affirmed.

ARGUMENT IN OPPOSITION TO GRANTING CERTIORARI

A. THE DECISIONS OF THE FEDERAL COURTS CORRECTLY APPLIED THE ABSTENTION DOCTRINE SINCE THERE WAS A STATE JUDICIAL PROCEEDING PENDING.

The Federal District Court correctly applied the principles of *Younger v. Harris,* 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971) and *Middlesex County Ethics Committee v. Garden State Bar Association,* 457 U.S. 423, 102 S. Ct. 2515, 73 L. Ed. 2d 116 (1982) and dismissed Petitioner's action. In *Younger, supra,* the Supreme Court stated a strong federal policy of federal court abstention from interference with pending state judicial proceedings, absent extraordinary circumstances. The Federal Courts correctly found that there was no extra-ordinary circumstances which would warrant federal intervention.

The Federal District Court in dismissing the action found that the Ohio disciplinary procedure is a part of the ongoing judicial proceeding of the Ohio Supreme Court, *Coogan v. Cincinnati Bar Association,* 431 F. 2d 1209 (6th Cir. 1970).

The Federal District Court found that the important state interest is recognized in that the Ohio Constitution grants to the Ohio Supreme Court the jurisdiction to regulate the admissions of attorneys, enforce discipline among members of the bar, and in all other matters relating to the practice of law. *Article IV Sec. 2 (B) (1) (g)* Ohio Constitution. The State's interest is also demonstrated by the fact that the Disciplinary Counsel, Respondent, of the Supreme Court is named as a party.

The Federal District Court also determined that the third criteria was found in that there was an adequate opportunity in the state proceedings to raise constitutional questions. Once the Board of Commissioners on Grievances and Disci-

pline issues its report, the Supreme Court issues an order to show cause why the report should not be confirmed. When timely objections are filed the Court conducts a hearing wherein the attorney is given an opportunity to raise constitutional challenges. *Cleveland Bar Association v. Pleasant,* 167 Ohio St. 324, 148 N.E. 2d 493 (1958).

The Federal Court's decision was affirmed by the Court of Appeals which found that no prejudicial error intervened in the judgment and proceedings in the District Court.

Petitioner misstates the type of discipline which may occur in that Petitioner is subject only to disbarment. Such is not the case, the discipline that can be recommended by the Board of Commissioners can be public reprimand, one year suspension, indefinite suspension or disbarment. Furthermore the disciplinary action could be dismissed by the Panel or the Board.

Petitioner maintains that a state disciplinary proceeding is similar to a criminal proceeding, such is not the case. The proceeding is neither civil nor criminal but is sui generis, stemming from the inherent power of the Ohio Court to regulate the practice of law, *Ohio State Bar Association v. Weaver,* 41 Ohio St. 2d 97; 322 N.E. 2d 665 (1975).

CONCLUSION

Petitioner would ignore and have this Court ignore the sound reasoning and decision of the Federal District Court. The facts are that Petitioner has an adequate remedy in the state system, that disciplinary action was pending, a formal disciplinary complaint had been filed. The issue is now moot and Petitioner can raise his defense including constitutional challenges in the state proceeding.

The Federal District Court correctly determined that Disciplinary Counsel's position and actions were part of an ongoing state judicial proceeding and that therefore abstention was appropriate under the Younger and Middlesex County doctrine. The Sixth District U.S. Court of Appeals affirmed without opinion. The Petition should be denied.

Respectfully submitted,

/s/ Angelo J. Gagliardo
ANGELO J. GAGLIARDO
Counsel of Record
Disciplinary Counsel of the
Ohio Supreme Court

/s/ Carl J. Corletzi
CARL J. CORLETZI
Staff Counsel of Office of
Disciplinary Counsel

COUNSEL FOR RESPONDENT
ANGELO J. GAGLIARDO
DISCIPLINARY COUNSEL
OHIO SUPREME COURT

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have been served upon the Petitioner, Sheldon Stein, by forwarding such copies to the office of his Counsel, Jack M. Schulman, 748 Standard Building, 1370 Ontario Street, Cleveland, Ohio 44113-1727, by United States mail, first class postage prepaid, this 15th day of May, 1984. I further certify that all parties required to be served have been served.

/s/ Angelo J. Gagliardo
ANGELO J. GAGLIARDO
Counsel of Record for
Respondent

APPENDIX

OHIO CODE OF PROFESSIONAL RESPONSIBILITY
(Excerpts)
DISCIPLINARY RULES

DR 1-102 MISCONDUCT

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turitude [*sic*].

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 2-102 PROFESSIONAL NOTICES, LETTERHEADS AND OFFICES

(A) A lawyer or law firm shall not use or participate in the use of professional cards, professional announcement cards, office signs, letterheads, or similar professional notices or devices, except that the following may be used if they are in dignified form:

(1) A professional card of a lawyer identifying him by name and as a lawyer, and giving his address, telephone numbers, the name of his law firm, and any information permitted under DR 2-105. A professional card of a law firm may also give the names of members and associates. Such cards may be used for identification.

(2) A brief professional announcement card stating new or changed associations or ad-

dresses, change of firm name, or similar matters pertaining to the professional office of a lawyer or law firm, which may be mailed to lawyers, clients, former clients, personal friends, and relatives. It shall not state biographical data except to the extent reasonably necessary to identify the lawyer or to explain the change in his association, but it may state the immediate past position of the lawyer. It may give the names and dates of predecessor firms in a continuing line of succession. It shall not state the nature of the practice except as permitted under DR 2-105.

(3) A sign on or near the door of the office and in the building directory identifying the law office. The sign shall not state the nature of the practice, except as permitted under DR 2-105.

(4) A letterhead of a lawyer identifying him by name and as a lawyer, and giving his addresses, telephone numbers, the name of his law firm associates, and any information permitted under DR 2-105. A letterhead of a law firm may also give the names of members and associates, and names and dates relating to deceased and retired members. A lawyer may be designated "Of Counsel" on a letterhead if he has a continuing relationship with a lawyer or law firm, other than as a partner or associate. A lawyer or law firm may be designated as "General Counsel" or by similar professional reference on stationery of a client if he or the firm devotes a substantial amount of professional time in the representation of that client. The letterhead of a law firm may give the names and dates of predecessor firms in a continuing line of succession.

(B) A lawyer in private practice shall not practice under a trade name, a name that is misleading as to the identity of the lawyer or lawyers practicing under such name, or a firm name containing names other than those of one or more lawyers in the firm, except that the name of a professional corporation or professional association or legal clinic may contain "P.C." or "P.A." or similar symbols indicating the nature of the organization and if otherwise lawful a firm may use as, or continue to include in, its name the name or names of one or more deceased or retired members of the firm or of a predecessor firm in a continuing line of succession. A lawyer who assumes a judicial, legislative, or public executive or administrative post or office shall not permit his name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which he is not actively and regularly practicing law as a member of the firm, and during such period other members of the firm shall not use his name in the firm name or in professional notices of the firm.

(C) A lawyer shall not hold himself out has having a partnership with one or more lawyers or professional corporations unless they are in fact partners.

(D) A partnership shall not be formed or continued between or among lawyers licensed in different jurisdictions unless all enumerations of the members and associates of the firm on its letterhead and in other permissible listings make clear the jurisdictional limitations on those members and associates of the firm not licensed to practice in all listed jurisdictions; however, the same firm name may be used in each jurisdiction.

(E) A lawyer who is engaged both in the practice of law and another profession or business shall not so indicate on his letterhead, office sign, or professional

card, nor shall he identify himself as a lawyer in any publication in connection with his other profession or business.

(F) Nothing contained herein shall prohibit a lawyer from using or permitting the use, in connection with his name, of any earned degree or title derived therefrom indicating his training in the law.

(G) A legal clinic operated by one or more lawyers may be organized by said lawyer or lawyers for the purpose of providing standardized and multiple legal services. The name of the law office shall consist only of the names of one or more of the active practitioners in such organization, and may include the phrase "legal clinic" or words of similar import. The use of a trade name or geographical or other type of identification or description is prohibited. The name of any active practitioner in such clinic may be retained in the name of the legal clinic after his death, retirement or inactivity because of age or disability, and the name must otherwise conform to other provisions of the Code of Professional Responsibility and the Supreme Court Rules for the Government of the Bar of Ohio. The legal clinic cannot be owned by, nor can profits or losses be shared with, non-attorneys or attorneys who are not actively engaged in the practice of law in such organization.

OHIO CONSTITUTION ARTICLE IV SEC. 2

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) the supreme court shall have original jurisdiction in the following:

(a) Quo warranto;

(b) Mandamus;

(c) Habeas corpus;

(d) Prohibition;

(e) Procedendo;

(f) In any cause on review as may be necessary to its complete determination;

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

(ii) Cases in which the death penalty has been affirmed;

(iii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained.

(c) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

(d) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

(e) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3(B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor. (Amended May 7, 1968.)

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No. 83-1709

In The
Supreme Court of the United States
October Term 1983

SHELDON STEIN,
Petitioner,

vs.

ANGELO GAGLIARDO,
Respondent.

REPLY BRIEF OF PETITIONER, SHELDON STEIN

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No. 83-1709

In The
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SHELDON STEIN,
Petitioner,

vs.

ANGELO GAGLIARDO,
Respondent.

REPLY BRIEF OF PETITIONER, SHELDON STEIN

THE ABSTENTION DOCTRINE HAS NO APPLICATION WHERE STATE QUASI-CRIMINAL PROCEEDINGS ARE THREATENED, BUT NOT FILED

The substance of Respondent Gagliardo's Brief in Opposition to Petition for Certiorari is that the District Court properly abstained from exercising jurisdiction because ". . . [t]he Ohio disciplinary procedure is part of the ongoing judicial proceedings of the Ohio Supreme Court . . ." (Brief of Respondent at 3), and that Petitioner Stein was, therefore, involved in state judicial proceedings when he filed suit.

This statement is misleading and distorts that which has transpired in this case. While it is true that the Ohio Supreme Constitution grants to the Ohio Supreme Court the power to regulate attorneys in Ohio, it does *not* follow that every communication between the Ohio Supreme Court or one of its employees with a member of the Ohio Bar is part of a formal judicial proceeding so as to require the application of the abstention doctrine of *Younger vs. Harris*, 410 U.S. 37 (1971).

The Ohio Supreme Court has promulgated rules of professional conduct by which all attorneys admitted to practice in Ohio are bound. These rules are known as the Ohio Code of Professional Responsibility.

Attorneys who violate the Code of Professional Responsibility are subject to discipline pursuant to the provisions of Rule V of the Supreme Court's Rules for the Government of the Bar (hereinafter "Rule V"). The punishment can range from disbarment to a public reprimand.

The Ohio Supreme Court has created a quasi-judicial administrative body, The Board of Commissioners on Grievances and Discipline. Rule V specifies that the Board of Commissioners on Grievances and Discipline is the body empowered to consider, at the first instance, charges pending against attorneys practicing law in the State of Ohio. "The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to this Court. . . ." Rule V (2).

The Ohio Supreme Court has also created the position of the Disciplinary Counsel. The Disciplinary Coun-

sel, in this case Respondent Gagliardo, serves a prosecutorial function with respect to the charges of alleged misconduct by lawyers. The Disciplinary Counsel is *not* a judicial or quasi-judicial official. His only function, according to Rule V, is ". . . [to investigate and thereafter] . . . file a complaint with the Board of Commissioners on Grievances and Discipline." A copy of this letter is reproduced on page 30 of the Appendix to the Petition for Writ of Certiorari.

This case was filed in the District Court on June 9, 1983. Until that time the only action that had taken place was a series of letters sent by Gagliardo to Stein, in which Gagliardo threatened to file a formal complaint with the Board of Commissioners of Grievances and Discipline unless Stein ceased from activities, protected by the First Amendment, which he had undertaken in the past. Copies of these letters are reproduced on pages 19-30 of the Appendix to the Petition for Writ of Certiorari.

The record clearly demonstrates that a formal complaint was not filed until after "proceedings of substance on the merits" had taken place in the District Court, and that this case falls within the ambit of *Hicks vs. Miranda,* 422 U.S. 332 (1975), which holds that *Younger* abstention has no application where a formal state proceedings is commenced after there has been "proceedings on the substance on the merits" in the federal action.

As of June 9, 1983, when Stein filed his complaint in the District Court (and even as of June 24, 1983, when same was dismissed), *no* formal complaint had been filed against Stein with the Board of Commissioners on Grievances and Discipline. *No* judicial or quasi-judicial body

had been convened with respect to this controversy, *nor* had any such body attempted to exercise jurisdiction over Stein. It was not until July 1, 1983, well after the case went to judgment, a Notice of Appeal filed to the United States Court of Appeals for the Sixth Circuit, the appeal docketed, and after the Court of Appeals denied Stein's request for an injunction, that Gagliardo filed a formal complaint against Stein with the Board of Commissioners on Grievances and Discipline.

Although disbarment proceedings are quasi-criminal in nature, *In Re Ruffalo,* 390 U.S. 544, 551 (1967); *Ex Parte Garland,* 71 U.S. (4 Wall) 333, 380 (1866), an analogy can be drawn between them and the typical criminal case in that both types of cases seek to impose some sort of a penalty. Although the investigation of a criminal case is part of the ongoing state criminal judicial proceedings, this court in *Younger and Steffel vs. Thompson,* 415 U.S. 452, 475 (1974) held that federal relief "[i]s not precluded when *no* state prosecution is pending and a federal plaintiff demonstrates a genuine *threat* of enforcement of a disputed state crimminal state. . . ." (emphasis added). See, generally, 17 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* Sec. 4253, pp. 555-6. This holding applies with equal force to the case at bar.

Stein was faced, at the time that he filed suit, with a "Catch-22" situation. He had been instructed to cease activities which are protected by the First Amendment, and had been threatened with disbarment proceedings if he failed to do so. A formal complaint had not been filed with the Board of Commissioners on Grievances and Discipline or pending before the Ohio Supreme Court so that Stein could raise his constitutional challenges to certain

provisions of the Ohio Code of Professional Responsibility. Stein filed suit because he was faced with the unenviable choice of foregoing protected constitutional activity in the face of the threat of punishment and possible professional ruination, or flouting state law and risking disbarment. Consequently, Stein had to cause "state judicial proceedings" to be commenced against him to raise his constitutional challenges. *That* is precisely the reason that *Younger vs. Harris* sanctions abstention *only* where there are "pending state judicial proceedings". Absent such "pending state judicial proceedings", Stein did not have a forum in which he could litigate the constitutional issues. As this Court noted in *Steffel,* one should not have to face the "Scylla of intentionally flouting state . . . [law] and the Charybdis of foregoing what [they] believe to be constitutionally protected activity." 415 U.S. at 462.

Based upon the foregoing, the Respondent's argument in opposition to the granting of a Writ of Certiorari in this case lacks merit. For the reasons set forth in this Brief and in the Petition for Writ of Certiorari, the Petitioner respectfully prays the Court to issue a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit and to review and decide this case.

Respectfully submitted,

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APPENDIX

APPENDIX

OHIO SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR

(Excerpts)

Rule V

DISCIPLINARY PROCEDURE

Pursuant to the powers of this Court over the Bar of this State and the members thereof, this rule is amended, as follows, effective on July 1, 1983, and shall apply to all pending cases.

(1) Creation of Board of Commissioners on Grievances and Discipline of the Bar. There is hereby created as Commissioners of this Court a Board of Commissioners on Grievances and Discipline of the Bar. Said Board of Commissioners shall consist of seventeen (17) members of the Bar of this Court, appointed by this Court. The members of such Board shall be appointed from each of the Ohio Appellate District as follows: District 1, two members; District 2, one member; District 3, one member; District 4, one member; District 5, one member; District 6, two members; District 7, one member; District 8, three members; District 9 one member; District 10, two members; District 11, one member; and District 12, one member. Initial appointments under this rule shall be made as follows: Members appointed from former districts one (1), four (4), six (6), seven (7), eleven (11), twelve (12), thirteen 13), and fifteen (15), with remaining terms shall continue to serve for the same term for the new districts one (1), six (6), two (2), ten (10), nine (9), eight (8), eleven (11), and seven (7), respectively. The member appointed from new district three (3) shall be selected by

majority vote of the Supreme Court, from among the members appointed from former districts three (3) and sixteen (16). The member appointed from new district four (4) shall be selected, by majority vote of the Supreme Court, from among members appointed from former district eight (8) and seventeen (17). The member appointed from new district five (5) shall be selected, by majority vote of the Supreme Court, from among the members appointed from former districts nine (9) and ten (10). The members selected from districts three (3), four (4) and five (5) shall continue to serve their present term. The remaining members shall be appointed by this Court for the following terms: One (1) member from district one (1) for the term ending 12-31-83; one (1) member from district six (6) for the term ending 12-31-85; one (1) member from district eight (8) for the term ending 12-31-84; one (1) member from district eight (8) for the term ending 12-31-85; one member from district ten (10) for the term ending 12-31-85; one member from district twelve (12), for the term ending 12-31-85. Thereafter the term of office of each member of said Board of Commissioners shall be three (3) years, beginning on January 1 next following his appointment with each member eligible for reappointment to one succeeding term. Any member of the Board whose term has expired and who shall have an uncompleted assignment as a member of a panel shall continue to serve for the purpose of such assignment until it shall have been concluded before the Board of Commissioners, and further provided that his successor commissioner shall take no part in the proceedings of the Board concerning such assignment. Appointments to terms commencing January 1 of any year shall be made prior to December 1 of the preceding year. Vacancies for any

cause shall be forthwith filled by appointment by this Court for the unexpired term. The Court shall each year designate one member as Chairman of said Board of Commissioners and designate a Secretary, each of whom shall have authority to execute journal entries on behalf of the Board of Commissioners and of panels thereof. The Board of Commissioners shall meet in Columbus, Ohio, the first Friday after the second Monday during the months of February, April, June, August October and December. The Chairman or the Secretary of the Board may call additional meetings of the Board when necessary.

(2) Jurisdiction of the Board. The Board of Commissioners is empowered and charged to receive, entertain, inquire into, take evidence, preserve the record, make findings and submit recommendations to this Court as hereinafter provided:

(a) concerning complaints of misconduct as hereinafter defined which are alleged to have been committed by an attorney and counselor at law, person under suspension from the practice of law, or

(b) concerning the mental illness of any attorney and counselor at law or

(c) relating to petitions for reinstatement as an attorney and counselor at law in this State, or

(d) upon reference by this Court of conduct by an attorney affecting any proceeding under this rule, where the acts allegedly constitute a contempt of this Court or a breach of these rules but did not take place in the presence of the court or a member thereof, whether by willful disobedience of any order or judgment of this Court or the Board of Commissioners, by interference with any officer of this Court in the prosecution of any duty, or otherwise; provided that nothing herein shall be construed as limiting or affecting the plenary power of this Court to impose

punishment with reference either to contempts or breaches of these rules committed in its presence or the plenary power of any other court with reference to contempts committed in its presence.

(3) Referral for Investigation. The Board of Commissioners may refer to the Grievance Committee of the appropriate local bar association or to Disciplinary Counsel any matters coming to its attention for investigation, as hereinafter provided.

There is hereby created the position of Disciplinary Counsel. The Supreme Court shall appoint a Disciplinary Counsel and such assistants as necessary who shall be attorneys at law admitted to practice in this State and who shall not engage in the private practice of law while serving in that capacity.

In the event that a Grievance Committee of a local bar association determines in the course of a disciplinary investigation that the matters of alleged misconduct under investigation are sufficiently serious and complex as to require the assistance of the Disciplinary Counsel, the Chairman of the Grievance Committee of the local bar association may direct a written request for assistance to the Disciplinary Counsel. The Disciplinary Counsel shall investigate all such matters referred to him and report the results of the investigation to the committee which requested it.

All complaints alleging violations of DR 2-101 and DR 2-102(A) and (B) shall be referred to or filed with Disciplinary Counsel. Disciplinary Counsel shall have exclusive authority to investigate such complaints, file formal complaints with the Board and prosecute formal complaints filed with the Board. All formal complaints filed

with the Board alleging violation of DR 2-101 and DR 2-102(A) and (B) shall be filed by the Disciplinary Counsel in the name of Disciplinary Counsel as relator. Proceedings in such matters shall be conducted in the same manner as all other disciplinary proceedings provided for in this rule.

The Disciplinary Counsel shall appoint, with the approval of the Supreme Court, staff personnel as required to satisfactorily complete investigation of matters referred to him pursuant to these rules or filed with him pursuant to Rule II of the Supreme Court Rules for the Government of the Judiciary. The Supreme Court shall fix the compensation of the Disciplinary Counsel and personnel employed by the Disciplinary Counsel and provide office facilities, furnishings, stationery, equipment and office supplies for the Disciplinary Counsel.

Funds for the operation of the Disciplinary Counsel's office, including compensation of the Disciplinary Counsel, and staff, shall be provided from the registration fees collected pursuant to Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

The Disciplinary Counsel shall be under the supervision of and responsible to the Secretary of the Board of Commissioners on Grievances and Discipline of the Bar and the Board of Commissioners on Grievances and Discipline of the Judiciary created in Rule II of the Supreme Court Rules for the Government of the Judiciary, and shall file annually with the Supreme Court and the Secretary a report of the activities and accomplishments of his office and a report of the expenses of operation of his office.

(4) Application of Rule; Authority and Duty of Bar Committees and Disciplinary Counsel. From and after the effective date of this rule, all proceedings with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law; all proceedings for the discipline of such attorneys and counselors at law, persons under suspension or disbarred from the practice of law; and all proceedings for reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Disciplinary Counsel and any committee authorized by any regularly organized local bar association shall investigate any matter referred to them or which comes to their attention, and may cause a complaint to be filed pursuant to this rule in cases where they find reasonable cause to believe that misconduct has occurred or that a condition of mental illness exists.

The investigation of complaints with regard to mental illness and complaints and grievances involving alleged misconduct by attorneys and counselors at law shall be conducted by Disciplinary Counsel or the Grievance Committee of a local bar association. A local bar association may provide by its constitution, regulations or rules, for the appointment of lay persons as members of its grievance committee, provided that the majority of such committee shall consist of attorneys at law admitted to the practice of law by this Court.

The investigation of complaints shall be concluded within sixty days from the date of the receipt of the complaint. A decision as to the disposition of such complaint shall be made within thirty days thereafter. Extensions of time for completion of the investigation may be granted

upon written request, and for good cause shown, by the Secretary or Acting Secretary, of the Board of Commissioners on Grievances and Discipline of the Bar. If the investigation is not completed within sixty days from the date of filing the complaint and no written request has been made for an extension of time, the matter under investigation shall be referred to the Disciplinary Counsel. No extension of time shall be granted beyond one-hundred-fifty days from the date of receipt of the complaint. If an investigation by the Grievance Committee of a local bar association is not completed within one-hundred-fifty days from the date of filing the complaint, the matter under investigation shall be referred to the Disciplinary Counsel.

If a committee or Disciplinary Counsel determines upon investigation of a complaint that the filing of a formal complaint with the Board of Commissioners on Grievances and Discipline of the Bar is not warranted, the complainant shall be notified in writing of that determination.

• • •

(9) The Complaint; Where Filed; By Whom Signed. A complaint shall mean a formal written complaint alleging misconduct or mental illness of one who shall be designated as the Respondent. Six (6) copies of all such complaints shall be filed in the office of the Secretary of the Board. Complaints filed by a Grievance Committee of any regularly organized local bar association in the State shall not be accepted for filing unless signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing signed by the President, Secretary, or Chairman of the Grievance Committee of any reg-

ularly organized local bar association in the State (which association shall be deemed the Relator), certifying that said counsel are duly authorized to represent said Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Realtor believes reasonable cause exists to warrant a hearing on such complaint, and shall constitute the authorization of such counsel to represent said Relator in the premises as fully and completely as if designated and appointed by order of the Supreme Court of Ohio with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved.

Complaints filed by Disciplinary Counsel shall be filed in the name of Disciplinary Counsel as relator.

Upon the filing of a complaint with the Secretary of the Board, relator shall forward a copy thereof to Disciplinary Counsel and the local bar association of the county in which the Respondent resides and maintains his office and the county from which the complaint arose.

(10) Duty of the Board Upon Filing of the Complaint.

(a) Notice to Respondent. The Secretary of the Board of Commissioners shall send a copy of the complaint by certified mail to the Respondent with a notice requiring him to file, within twenty (20) days after the mailing of such notice, six (6) copies of his answer and to serve copies thereof upon counsel of record named in the complaint. Extensions of time for the filing of the answer may be granted, for good cause shown, by the Secretary of the Board of Commissioners.

(b) Mental Illness Suspension. After an answer has been filed or the time for answer has elapsed, if the complaint or answer alleges mental illness supported by a certified copy of a journal entry of a court of competent jurisdiction adjudicating mental illness, or if the Board finds existing mental illness after an examination provided in (c) hereof, the Board shall forthwith certify the complaint to this Court and the Court may suspend the Respondent from the practice of law.

(c) Examination. If the complaint or answer alleges existing mental illness unsupported by a journal entry of a court of competent jurisdiction or mental illness is otherwise placed in issue, the Board or panel may, on its own motion or on motion by either party, order a medical or psychiatric examination of Respondent by one or more physicians, designated by the Board or panel, whose findings shall be presented to the Board or panel as evidence and made available to both parties.

(d) Duty of Clerk on Entering Order. Upon the entry of an order suspending an attorney for mental illness, the Clerk of the Court shall mail certified copies thereof as provided in paragraph one of Section (20) and shall change the registration of respondent to inactive status. No publication of such order shall be made but the order shall be a matter of public record.

(e) Termination. Any suspension under this section may be terminated on Respondent's application to the Board and a showing of removal of the cause for the suspension, which is certified by the Board to, and affirmed by, the Court.

(11) Hearing by Panel of Three Commissioners. After Respondent's answer has been filed, or the time has expired within which Respondent was required to file such answer, a formal hearing shall be held, upon reasonable notice, by a panel of Commissioners appointed by the Sec-

retary of said Board of Commissioners, who shall designate one member of such panel as chairman of the panel. Such panel shall consist of three (3) Commissioners, no one of whom shall be a resident of the district from which such complaint originated. A majority of such panel shall constitute a quorum for all purposes. Requests for continuances may be granted by the Chairman of the panel for good cause shown.

The Chairman of the panel may have a transcript prepared of the testimony taken at each such formal hearing, and the cost thereof shall be paid by the Secretary of the Board of Commissioners, or taxed as costs.

(12) Authority of Panel; Dismissal. If the panel finds that the complaint or evidence is insufficient to support a charge of misconduct the panel may order that the complaint be dismissed. Such action shall be reported to the Secretary of the Board of Commissioners who shall give written notice of the action taken to the Board of Commissioners, the Respondent, all counsel of record, Disciplinary Counsel, and the local bar association or associations of the county in which the Respondent resides and maintains his office and the county from which the complaint arose.

(13) Referral by Panel. In the alternative if the panel determines that findings of fact and recommendations for dismissal should be referred to the Board of Commissioners for review and action by the full Board, the panel may submit its findings of fact to the Board of Commissioners and may recommend dismissal in the same manner as provided in the following sections of this Rule V with respect to public reprimand, suspension or disbarment.

• • •

(20) Review by Court; Reimbursement for Expenses of Board, Duty of Clerk on Entering Order; Duties of Disqualified or Resigned Attorney.

(a) After hearing on objections, or, if objections are not filed within the prescribed time, this Court shall enter such order as it may find proper, which may include provision for reimbursement of costs and expenses incurred by the Board of Commissioners. Upon the entry of any disciplinary order pursuant to this rule, or acceptance of resignation from the practice of law, the Clerk of this Court shall mail certified copies thereof to counsel of record, to the Board of Commissioners, to Respondent attorney (at his last known address), to the Disciplinary Counsel, to the local bar association or associations in the county or counties in which such attorney resides and maintains his office and the county or counties from which the complaint originated, to the Presiding Judge of the Court of Common Pleas for such county or counties, and to the Presiding Judge of the United States District Courts in Ohio, the United States Court of Appeals for the Sixth Circuit, and to the Supreme Court of the United States.

• • •